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4-637

In The

Supreme Court of the United States

October Term, 1941.

No. 157

BERNICE VINCE,

Petitioner,

-

GREAT NORTHERN LIFE INSURANCE COMPANY,
a Corporation.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ARTHUR J. ABBOTT,
2230 Buhl Building,
Detroit, Michigan,
Counsel for Petitioner.

NATIONAL LAW REPORTING CORPORATION, 4429-30 First Avenue, Detroit, Michigan
Phone 7117

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Pacific Indemnity Company v. McDonald, 107 Fed. (2d) 446 (C. C. A. 9) 2 Federal Rules Service, 38-a 71 and in 131 A. L. R. 218.....7, 15, 17
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United States F. & G. Company v. Koch, 102 Fed. (2d) 288 (C. C. A. 3) 17
United States F. & G. Company v. Nauer, U. S. District Ct. d. Massachusetts, 1/23/41, 4 Federal Rules Service 38-a 71, Case 1..... 17

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Text Books Cited.

Couch, Encyclopedia of Insurance Law, Vol. 2, Sec. 511, pages 1462-3 20
Joyce Law of Insurance, 2d Ed., Sec. 474-a..... 20
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No

BERNICE VINCE,

Petitioner,

v.

GREAT NORTHERN LIFE INSURANCE COMPANY, a Corporation.

PETITION FOR CERTIORARI.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Bernice Vince, by her counsel, Arthur J. Abbott, alleges:

A. Statement Of Matter Involved.

1. Decision Appealed From.

The instant petition seeks to review the decision of the Circuit Court of Appeals for the Sixth Circuit which

reversed the District Court for the Eastern District of Michigan, Southern Division, and directed the entry of a decree adjudging a policy of insurance to be null and void.

2. Issuance Of Policy and Denial Of Claim.

Under date of April 29, 1937, the Great Northern Life Insurance Company (hereinafter referred to as the "Company") issued a policy of life insurance in the sum of six thousand dollars to William A. Vince, with your petitioner, wife of the insured, as beneficiary (R. 7). The insured died on March 4, 1938, and due proofs were submitted and claim made (R. 8).

On April 28, 1938, the company denied the claim on the basis that the application was false in not disclosing disorders of respiratory system (pneumonia) which the insured had had in 1926-27 and 1931-32 (R. 179).

3. Suit By Company Under Declaratory Judgment Act.

On May 2, 1938, the company brought suit in the District Court under the Federal Declaratory Act of June 14, 1934 (28 J. S. C. A. 400) to have said policy adjudged to be null and void (R. 2-10). After answering, your petitioner filed a cross-claim for the amount due under the policy (R. 16-18) and made a written request for a trial by jury (R. 24).

4. Although Parties Reversed, Issues Were Tried As At Law By the Court and Jury.

The cause came on to be heard before the Honorable Frank A. Picard on September 12, 1939, and, although the parties were reversed in their position before the court, the issues were tried as at law by the court and jury. The jury rendered a verdict in favor of your petitioner and against the company (R. 26-27). Subsequently the company filed a petition for a judgment notwithstanding the verdict and judgment, or in the alternative for a new trial, which the court denied (R. 29).

5. Facts Submitted To Court and Jury.

It was shown by evidence submitted at the trial of the cause that:

(a) ACCORDING TO ADMISSION OF CHIEF UNDERWRITER, COMPANY WOULD HAVE ACCEPTED RISK IF ILLNESS COMPLAINED OF HAD BEEN DISCLOSED IN APPLICATION.

The chief underwriter of the company testified as to his extensive knowledge and experience in such capacity and the uniformity of underwriting practices. When it was pointed out that several other old line companies had accepted the risk in question with a full disclosure of the illnesses complained of (R. 99, 126, 129), he admitted his company would have accepted the risk if the illnesses had been disclosed (R. 177-178).

(b) AT THE TIME THE CHIEF UNDER-

WRITER OF THE COMPANY PASSED UPON THE APPLICATION, HE KNEW THE INSURED HAD HAD PNEUMONIA ALTHOUGH IT WAS NOT DISCLOSED IN APPLICATION.

The chief underwriter of the company passed upon the application (R. 66). At the time the application was considered there was placed on a data sheet forming a part of the file a coded notation "4-29-N" which the witness deciphered as meaning that the insured "had pneumonie within the year; that would be between 1926 and 1927" (R. 74).

(c) ALTHOUGH THE UNDERWRITER KNEW THE APPLICATION WAS FALSE IN THE ABOVE RESPECT, HE DID NOT NOTIFY THE APPLICANT OR MAKE FURTHER INVESTIGATIONS.

The record does not show that the company notified the applicant of the above discrepancy. The underwriter did not investigate further (R. 74).

(d) THE COMPANY EXCHANGED INFORMATION WITH OTHER COMPANIES ON REPORTS OF DISORDERS OF ANY INDIVIDUAL RECEIVING A POLICY OF INSURANCE FROM ANY OLD LINE COMPANY.

The underwriter testified that the company maintained a file of information exchanged between all old line companies which included the report of any disorder to any of the companies (R. 174). Proofs submitted by your petitioner showed that the insured reported the illness

complained of to several old line companies (R. 99, 126, 129).

(e) APPLICANT INFORMED COMPANY'S MEDICAL EXAMINER OF DISORDERS COMPLAINED OF AT THE TIME OF MAKING THE APPLICATION.

A witness, Thomas G. Andris, was present at the time the company's medical examiner examined the insured. He was present because he was being examined for a similar policy (R. 88). The medical examiner filled in the answers to the questions contained in the application (R. 132, 89). He wrote some of the answers at the time of questioning the applicant orally and others later (R. 89-90). The witness testified the applicant answered all of the questions correctly and informed the medical examiner that he had had pneumonia (R. 90).

(f) THE PREVIOUS ILLNESSES OF THE INSURED DID NOT CONTRIBUTE TO HIS DEATH.

Expert medical testimony showed that the previous illnesses of the insured did not contribute to his death (R. 115), and that there is no connection between attacks of pneumonia (R. 117). The company's medical examiner made a physical examination of insured and found him in good health (R. 68-69).

6. Circuit Court Of Appeals Ruled Petitioner Not Entitled To a Jury Trial On All Issues.

The Circuit Court of Appeals ruled that only the issues raised by the counterclaim should have been submitted

to the jury and then only in the form of special interrogatories for the guidance of the court in the adjudication of the declaratory relief prayed for, and thus definitely denied the right of a trial by jury on all of the material issues involved.

7. Circuit Court Of Appeals Held the Falsity Of Representations As Shown On Face Of Application Was Sufficient, As a Matter Of Law, To Void the Policy Regardless Of the Other Facts Which Were Submitted As Set Forth Above.

The Circuit Court of Appeals brushed aside the issues of fact raised by your petitioner and held the showing that the statements set forth in the application were false was sufficient to void the policy as a matter of law.

B. Reasons For Granting Certiorari.

1. Right Of Petitioner To Trial By Jury As At Law Was Denied.

The decision of the Circuit Court of Appeals, to-wit:

> "* * * the relief prayed in the counterclaim presents triable issues of fact in the decision of which the defendant was entitled to the verdict of a jury, though such issues should have been submitted upon special interrogatories for the guidance of the court in adjudication of the declaratory relief prayed (cancellation of policy)," * * *

is in conflict with the applicable decisions of this court and the leading decision of the Circuit Court of Appeals

for the Ninth Circuit, which has been adopted by other circuits. This court has held repeatedly that the defense of fraud in the inducement of an insurance policy is available in an action at law and the issue cannot be taken from a jury. The leading case decided by the Circuit Court of Appeals for the Ninth Circuit holds that cases such as the instant cause brought under the Declaratory Judgment Act should be tried by a court and jury as at law.

2. Decision Of Circuit Court Of Appeals For the Sixth Circuit Is Not Uniform With Decisions Of Other Circuit Courts Of Appeal On Right To Jury Trial Under Declaratory Judgment Act.

The opinion of the Circuit Court of Appeals made reference to *Pacific Indemnity Company v. McDonald, 107 Fed. (2d) 446 (C. C. A. 9)*, by saying, to-wit:

> "* * *, the opinion pointed out that the trial court was of the view that some issues of fact were essentially equitable in nature, and others essentially legal, and disposed of them accordingly. THIS COURSE WAS NOT DISAPPROVED."

Contrary to this statement, the method of trial by the District Court in the above cited case was emphatically disapproved, the court holding there was an absolute right to a jury trial under the Declaratory Judgment Act in cases such as the instant cause and that the factual issues should not have been tried piecemeal but that the entire case should have been submitted to the jury. This rule has been adopted in other circuits.

3. Circuit Court Of Appeals Apparently Reviewed Case As a Proceeding In Equity.

The opinion of the Circuit Court of Appeals is confusing in that at first it acknowledged an inability to give equitable relief for the cancellation of the policy; and second contended the triable issues of fact should have been submitted to the jury on special interrogatories for the guidance of the court in an adjudication of the declaratory relief prayed for; and third that it proceeded to grant the motion for a directed verdict based only on the *prima facie* proof of the company's defense and at the same time directed the entry of a decree adjudging the policy of insurance to be null and void which is in the nature of equitable relief such as the court earlier in its opinion concluded could not be granted by it.

4. Circuit Court Of Appeals Misstated the Position Petitioner Has Maintained In the Trial and On Appeal Regarding False Statements In Application.

In attempting to dispose of the case by a review of the motion for a directed verdict, the Circuit Court of Appeals misstated the position petitioner maintained in the trial and on the appeal regarding the company's defense of false statements contained in the application. Your petitioner did rely in part on the Michigan statute on false statements in the application, claiming, contrary to the court's apparent contention, that the statute was passed for the benefit of the petitioner and not the company. But the court failed to consider the remaining issues of law raised by your petitioner except the testimony of Thomas G. Andris.

Your petitioner maintained that the statements in the application were the conclusions of the company's medical examiner (R. 11); that the insured informed the medical examiner of his previous illnesses and that the company, being bound by such knowledge, was estopped from raising the defense of false statements (R. 11, 89, 198); that the company had actual knowledge of one illness and was put on inquiry to investigate (R. 74, 150); that the company, having been put on inquiry, could have checked its own file of information exchanged between companies, which should have disclosed the insured's entire medical history (R. 99, 126, 129, 174) or should have communicated with the applicant that the underwriter admitted the company would have accepted the risk if illnesses had been disclosed in application; that the fact insured had had pneumonia did not affect the hazard assumed.

Your petitioner contends a motion for a directed verdict can be considered only in the light of all the evidence submitted and issues raised.

5. Circuit Court Of Appeals Should Have Found, From the Evidence Submitted, That the Company Did Not Rely On the Statements In the Application.

The Circuit Court of Appeals, in reviewing the merits of the case, should have found from the circumstances existing at the time the application was passed upon, that the company did not rely on the false statements contained in the application and was therefore estopped from raising the defense of false statements.

6. The Circuit Court Of Appeals Should Have Found That the Company Failed To Sustain the Burden Of Proof Placed Upon It By the Michigan Statutes.

The Michigan statutes, Section 12427 and 12444, Compiled Laws, 1929, provide that in the absence of fraud, statements in the application shall be deemed representations and that in order to bar recovery under any policy it must be shown that the false statement was made with actual intent to deceive or that it materially affected either the acceptance of the risk or the hazard assumed. The company showed that in fact the statements as set forth on the face of the application were false did not prove that there was an actual intent to deceive except as a presumption alleged to be raised by law. As against such presumption, there is actual evidence submitted that such an intent was lacking. Inasmuch as the statutes were enacted for the benefit of the insured or beneficiary, the company has a burden of showing not only that the misrepresentations were relied upon but that they materially affected either the acceptance of the risk or the hazard assumed. Evidence was submitted showing that the company did not rely upon the application and that the company, having knowledge of the falsity of the application, did not have the right to rely on the same.

The underwriter of the company admitted he knew that the application was false since his file, at the time he passed upon the application, disclosed that the insured had had a previous illness of pneumonia. Your petitioner contends that this was sufficient to put the company on inquiry to make further investigation by examining its own records or by actually contacting the ap-

plicant for an explanation. It cannot be said that the company had a right as a matter of law to ignore this discrepancy without further investigation.

7. The Circuit Court Of Appeals Should Have Found For Petitioner On Merits Of Case.

Proofs submitted in this case will show that the Circuit Court of Appeals should have found for the petitioner on the merits of the case since the defense of the company of false statements in the application were based solely on the theory of fraud.

C. RELIEF.

WHEREFORE YOUR PETITIONER RESPECTFULLY PRAYS that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals, for the Sixth Circuit commanding that court to certify and send to this court for its review their determination on a day set to be therein designated, a full and complete transcript of the record and all proceedings of the case and that your petitioner may have such other or further relief in the premises as this court may seem just and proper and that the said decree of the Circuit Court of Appeals in the said case and every part thereof may be reversed by this honorable court.

ARTHUR J. ABBOTT,
Attorney for Petitioner.

Dated June 7th, 1941.